

**United States District Court**

For the Northern District of California

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6 SERVICE EMPLOYEES INTERNATIONAL UNION,  
7 et al.,

8 Plaintiffs,

9  
10 No. C 09-00404 WHA  
11  
12 v.  
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14 SAL ROSELLI, JORGE RODRIGUEZ, JOAN  
15 EMSLIE, JOHN BORROS, JOHN VELLARDITA,  
16 GABE KRISTAL, PAUL KUMAR, MARTHA  
17 FIGUEROA, BARBARA LEWIS, PHYLLIS  
18 WILLETT, DANIEL MARTIN, LAURA KURRE,  
19 RALPH CORNEJO, WILL CLAYTON, GLENN  
20 GOLDSTEIN, FRED SEAVEY, MARK KIPFER,  
AARON BRICKMAN, IAN SELDEN, GAIL  
BUHLER, FREJA NELSON, ANDREW REID,  
NATIONAL UNION OF HEALTHCARE WORKERS;  
MARYRUTH GROSS, CONNIE WILSON, ARLENE  
PEASNALL, CHERIE KUNOLD, FAYE LINCOLN,  
and DOES 1 through 100, inclusive,  
21 Defendants.  
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**COURT'S PROPOSED CHARGE AND SPECIAL VERDICT**

24 Appended hereto is a draft charge to the jury and special verdict form given to both sides  
25 on April 2, 2010. By **NOON ON SUNDAY, APRIL 4, 2010**, both sides may submit objections and  
26 proposed modifications. Please do not hold back merely because some proposal was previously  
27 made. If counsel thinks that these appended instructions are in error, then please so state in a  
28

1 memorandum filed by **APRIL 4 AT 4:00 P.M.** — otherwise, any objection will be deemed waived.  
2 These instructions have been prepared based on the way the case has actually been tried, taking  
3 due account of the proposals made before the trial.

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5 **IT IS SO ORDERED.**

6  
7 Dated: April 2, 2010.

Wm. Alsup  
\_\_\_\_\_  
8 WILLIAM ALSUP  
9 UNITED STATES DISTRICT JUDGE

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SERVICE EMPLOYEES INTERNATIONAL UNION,  
et al.,

Plaintiffs,

No. C 09-00404 WHA

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PEASNALL, CHERIE KUNOLD, FAYE LINCOLN,  
and DOES 1 through 100, inclusive,

## Defendants.

## FINAL CHARGE TO THE JURY

1.

Members of the jury, it is my duty to instruct you on the law that applies to this case.

Copies of these instructions will be available in the jury room for you to consult as necessary.

4 It is your duty to find the facts from all the evidence presented in the case. To those facts  
5 you must apply the law as I give it to you. You must not be influenced by any personal likes or  
6 dislikes, opinions, prejudices or sympathy. That means that you must decide the case solely on  
7 the evidence before you. In following my instructions, you must follow all of them and not  
8 single out some and ignore others; they are all equally important. You must not read into these  
9 instructions or into anything the Court may have said or done as suggesting what verdict you  
10 should return — that is a matter entirely up to you.

2.

The evidence from which you are to decide what the facts are consists of:

1. The sworn testimony of witnesses, on both direct and cross-examination, regardless of who called the witness;

2. The exhibits which have been received into evidence;

3. The sworn testimony of witnesses in depositions read into

evidence; and

4. Any facts to which all the lawyers have stipulated here in the courtroom before you. You must treat any stipulated facts as having been conclusively proven.

3.

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments, statements and objections by lawyers are not evidence.

The lawyers are not witnesses. What they have said in their opening statements, closing arguments and at other times is intended to help you interpret the

1 evidence, but it is not evidence. If the facts as you remember them differ from the  
2 way the lawyers have stated them, your memory of them controls.

3 2. A suggestion in a question by counsel or the Court is not evidence  
4 unless it is adopted by the answer. A question by itself is not evidence. Consider  
5 it only to the extent it is adopted by the answer.

6 3. Testimony or exhibits that have been excluded or stricken, or that  
7 you have been instructed to disregard, are not evidence and must not be  
8 considered.

9 4. Anything you may have seen or heard when the Court was not in  
10 session is not evidence. You are to decide the case solely on the evidence  
11 received at the trial.

12 4.

13 Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such  
14 as testimony by a witness about what that witness personally saw or heard or did. Circumstantial  
15 evidence is proof of one or more facts from which you could find another fact. By way of  
16 example, if you wake up in the morning and see that the sidewalk is wet, you may find from that  
17 fact that it rained during the night. However, other evidence, such as a turned-on garden hose,  
18 may explain the presence of water on the sidewalk. Therefore, before you decide that a fact has  
19 been proven by circumstantial evidence, you must consider all the evidence in light of reason,  
20 experience and common sense. You should consider both kinds of evidence. It is for you to  
21 decide how much weight to give to any evidence.

22 5.

23 In deciding the facts in this case, you may have to decide which testimony to believe and  
24 which testimony not to believe. You may believe everything a witness says or part of it or none  
25 of it. In considering the testimony of any witness, you may take into account:

26 1. The opportunity and ability of the witness to see or hear or know  
27 the things testified to;

28 2. The witness' memory;

- 1                   3.     The witness' manner while testifying;
- 2                   4.     The witness' interest in the outcome of the case and any bias or
- 3                   prejudice;
- 4                   5.     Whether other evidence contradicted the witness' testimony;
- 5                   6.     The reasonableness of the witness' testimony in light of all the
- 6                   evidence; and
- 7                   7.     Any other factors that bear on believability.

8                   6.

9                   The weight of the evidence as to a fact does not necessarily depend on the number of  
10                  witnesses who testify. Nor does it depend on which side called the witnesses or produced  
11                  evidence.

12                  7.

13                  A witness may be discredited or impeached by contradictory evidence or by evidence  
14                  that at some other time the witness has said or done something, or has failed to say or to do  
15                  something, that is inconsistent with the witness' present testimony. If you believe any witness  
16                  has been impeached and thus discredited, you may give the testimony of that witness such  
17                  credibility, if any, you think it deserves.

18                  8.

19                  Discrepancies in a witness' testimony or between a witness' testimony and that of other  
20                  witnesses do not necessarily mean that such witness should be discredited. Inability to recall is  
21                  common. Innocent misrecollection is not uncommon. Two persons witnessing an incident or a  
22                  transaction sometimes will see or hear it differently. Whether a discrepancy pertains to an  
23                  important matter or only to something trivial should be considered by you.

24                  However, a witness willfully false in one part of his or her testimony is to be distrusted in  
25                  others. You may reject the entire testimony of a witness who willfully has testified falsely on a  
26                  material point, unless, from all the evidence, you believe that the probability of truth favors his  
27                  or her testimony in other particulars.

28

1 9.

2 You have heard testimony from witnesses referred to as "expert witnesses." These are  
3 persons who, because of education or experience, are permitted to state opinions and the reasons  
4 for their opinions. Opinion testimony should be judged just like any other testimony. You may  
5 accept it or reject it, and give it as much weight as you think it deserves, considering the witness'  
6 education and experience, the reasons given for the opinion and all the other evidence in the  
7 case. If an expert witness was not present at the events in question, his or her opinion is  
8 necessarily based on an assumed set of circumstances. In evaluating the opinion during the trial,  
9 you should take into account the extent to which you do agree or do not agree with the  
10 circumstances assumed by the expert witness.

11 10.

12 In these instructions, I will often refer to the burden of proof. The burden of proof in this  
13 case is known as a burden of proof by a preponderance of the evidence. When a party has the  
14 burden of proof on any issue by a preponderance of the evidence, it means you must be  
15 persuaded by the evidence that the issue is more probably true than not true. To put it  
16 differently, if you were to put the evidence favoring plaintiff and the evidence favoring  
17 defendant on opposite sides of a scale, the party with the burden of proof on the issue would  
18 have to make the scale tip somewhat toward its side. If the party fails to meet this burden, then  
19 the party with the burden of proof loses on that issue. Preponderance of the evidence basically  
20 means "more likely than not."

21 11.

22 Plaintiffs have the burden of proof on all issues in this case. If you find that plaintiffs  
23 carried its burden of proof as to an issue your verdict should be for plaintiffs on that issue. If  
24 you find that plaintiffs did not carry its burden of proof, you must find against plaintiffs on that  
25 issue.

26 12.

27 In this case, all of our defendants were officers and/or employees of UHW prior to the  
28 trusteeship on January 27, 2009, after which they left and formed a new rival union called the

1 National Union of Health Workers. Once the trusteeship was in place on January 27, UHW was  
2 under new management. Under its new management, UHW then brought this lawsuit against  
3 defendants, who were the old management, alleging misconduct before they left UHW.

4 13.

5 There is, of course, a rift between these two unions. Solely by way of explaining the  
6 background of this case, you have heard evidence about this rift. But we are not here to decide  
7 which side has the better labor philosophy or who would better represent workers. Nor are we  
8 here to decide whether the jurisdiction decision on January 9 or the trusteeship decision on  
9 January 27 was wise or reasonable. Those issues are not for you to decide.

10 14.

11 I will now instruct you on the issues of liability and damages that are for you to decide.  
12 We have worked hard to simplify and streamline the claims and defenses as well as the number  
13 of issues you must decide.

14 15.

15 All defendants owed a duty to UHW and SEIU to refrain from obstructing or frustrating  
16 any formal decision made by SEIU or UHW by their authorized decisionmakers. Before any  
17 such formal decision was made, however, defendants were free to make their case within the  
18 system on any pending issue and, in doing so, were free to use staff and resources of UHW for  
19 that purpose. Therefore, once the formal SEIU decisions on jurisdiction and trusteeship were  
20 made, it was the duty of defendants to refrain from obstructing or frustrating those decisions or  
21 employing local staff and resources to do so or inducing or attempting to induce others to do so.  
22 At all times — both before and after those decisions, defendants were free to express their  
23 opinions as union members on the jurisdiction and trusteeship decisions. Thus, even after a  
24 formal decision was made, defendants were free to state their disagreement with the decision so  
25 long as they did not obstruct or frustrate the ability of UHW or SEIU to carry out the decision  
26 and did not induce others to obstruct or frustrate the ability of UHW or SEIU to carry out the  
27 decision.

28

16.

2       Until their departure, all defendants who were officers, employees or stewards also owed  
3 a duty to UHW to avoid undermining its ability to function normally. If any defendant, before  
4 his or her resignation, violated this duty or conspired with others or induced others to prevent  
5 the normal functioning of UHW, then said defendant would be liable for breach of duty.  
6       Similarly, all such defendants owed a duty to UHW to use its resources solely for the benefit  
7 of UHW and not to divert them for personal or non-UHW purposes. Any information or  
8 document covered by a confidentiality agreement had to be treated by a defendant signing it as  
9 belonging to UHW and could not be diverted for personal or non-UHW purposes.

17.

11 All defendants had a right to resign from UHW and then form a new union, even a rival  
12 union. There can be no liability for these actions. Nor can there be any liability, if it  
13 occurred, for defendants merely to agree with each other to resign, even at the same time.  
14 Defendants did not have, however, a right, while employed by UHW, to plan for the creation of  
15 a union or to undermine the ability of UHW to function after their departure. Nor did they have  
16 a right to use the resources of UHW to do so. Nor did defendants have the right to circulate  
17 disaffiliation petitions or decertification petitions prior to their resignation, although members  
18 were free to do so. When defendants left UHW, they were obligated to leave behind at UHW, or  
19 as the trustee directed, all keys, property and files of UHW in appropriate locations, including  
20 grievance and bargaining files and notes, computers, cell phones, membership lists and all copies  
21 thereof, and take with them only items owned by them. If any defendant complied with this  
22 obligation, then that defendant had no further obligation as a former officer or employee to assist  
23 UHW in the transition from the old management to the new management.

18.

25 In this case, defendants are not responsible for any events after defendants' resignations  
26 or removal unless it is proven that such events were caused by and were the foreseeable result of  
27 a breach of duty prior to defendants' departure from UHW. In this connection, there is no claim  
28 in this case against any defendant for assault, battery, theft, trespass or intimidation. You have

1 heard evidence about such things but there can be no liability for them unless a breach of duty is  
2 proven before their departure. That is, plaintiffs must prove that one or more defendants — prior  
3 to leaving UHW — set in motion a train of events with the foreseeable result that such assaults,  
4 batteries, thefts, trespasses or intimidation would occur, in which case defendants would be  
5 liable for any such foreseeable acts, such as increased security costs, even though those acts  
6 occurred after their departure.

7 || 19

8        No defendant can be held responsible for the conduct of other defendants or anyone else  
9 unless the conduct was induced by that defendant or the conduct was the direct and foreseeable  
10 result of a conspiracy in which said defendant participated.

11 || 20

12 A conspiracy is an agreement by two or more persons to commit a wrongful act. Such an  
13 agreement may be made orally or in writing or may be implied by the conduct of the parties.  
14 To prove a conspiracy, plaintiffs are not required to prove that each defendant personally  
15 committed a wrongful act or that he or she knew all the details of the agreement or the identities  
16 of all other participants. If a defendant himself or herself did not do a wrongful act, he or she  
17 may nonetheless be held liable on a conspiracy theory but only if he or she made an agreement  
18 with someone else to carry out or cause to be carried out one or more wrongful acts of the type  
19 in question, and that any wrongful act you find actually occurred was foreseeable by said  
20 defendant.

21 || 21

22 It will be helpful for you to keep in mind the difference between conduct of defendants  
23 versus conduct of others and the extent to which any defendant may or may not be held  
24 responsible for the conduct of others and of each other. Also keep in mind the difference  
25 between conduct before versus after the departure from UHW of defendants and the extent to  
26 which any defendant may or may not be held responsible for post-resignation events.

12. Now, I will turn to the specific damages claims sought by plaintiffs. *First*, plaintiffs seek

2 to recover the cost of the wages and benefits paid to defendants during January 2009 up to the  
3 date of their removals or resignations, which I will refer to for convenience as their "January  
4 time." If you find plaintiffs have proven that any defendant was, during his or her January time,  
5 in breach of his or her duty to UHW, then you must award such damages as are proven, if any,  
6 in proportion to the January time spent in breach versus the overall January time. If you find that  
7 a defendant's January time was predominated by such breaches, then you may award all of the  
8 salary and benefits for that defendant as damages. This claim, again, is for salary and benefits  
9 for the period from January 1–January 27, the date of the resignation or removals. Plaintiffs are  
10 not seeking reimbursement of defendants' salaries and benefits for any other time period.

11  
12. 23.

13 *Second*, plaintiffs seek the value of UHW staff time and UHW resources (other than  
14 salaries and benefits for defendants) that were allegedly diverted by defendants in violation of  
15 their duty. This claim is not limited to January 2009. The burden of proof is on plaintiffs to  
16 prove any such diversion. If you decide that plaintiffs have proven that any defendant diverted  
17 UHW resources to non-UHW purposes, then plaintiffs are entitled to recover such value of the  
18 diverted resources as you may find proven at trial.

19  
20. 24.

21 *Third*, plaintiffs seek recovery of alleged increased security costs to secure UHW office  
22 buildings and personnel following the trusteeship. To recover for this against any defendant,  
23 the burden is on plaintiffs to prove that:

24 1. The defendant — before he or she left UHW — set in motion one

25 or more scenarios calculated to lead to violence, vandalism, harassment, threats  
and/or intimidation;

26 2. Such hostile events in fact occurred; and

27 3. In reasonable response thereto plaintiffs incurred increased  
28 security costs.

1 Acts of violence, vandalism, harassment, threats and/or intimidation attributable to  
2 post-resignation actions and *not* rooted in pre-resignation/removal schemes cannot support this  
3 claim. Plaintiffs are only allowed to recover, if at all, such portions, if any, of the incremental  
4 costs you find have been proven to be a necessary and appropriate response. No defendant is  
5 liable under any circumstances for security costs over and above an amount that would have been  
6 a reasonable security response to any hostile acts you find resulted from a scheme by the  
7 defendant prior to leaving UHW.

8 25.

9 Finally, plaintiffs seek lost dues when defendants allegedly terminated extensions of  
10 otherwise expired collective bargaining agreements and thereby relieved employers of a duty to  
11 deduct UHW dues from paychecks. To succeed on this claim, plaintiffs must prove that:

12 1. The defendant, while still with UHW, terminated one or more such  
13 extensions in violation of his or her duty to UHW; and

14 2. The amount of dues that would have been collected under said  
15 extensions over and above what would have been collected had plaintiffs made  
16 reasonable efforts to collect said dues from members or to reinstate the  
17 extensions.

18 Plaintiffs must also prove that this was done to harm UHW. If you find that a termination was  
19 done to benefit UHW and its members, then there was no violation of a duty even if the  
20 terminations were otherwise unwise. The time period for this claim is from January 21, 2009, to  
21 the present.

22 26.

23 You must decide each claim separately as to each defendant. I will give you a special  
24 verdict form to guide your deliberations. If you find a defendant to be liable on any claim, then  
25 you may award such damages as you decide plaintiffs have proven. Damages may be proven by  
26 reasonable approximation but speculation and guesswork are insufficient to prove damages.  
27 If you find a defendant was not liable on a claim, either because no duty was breached or  
28 because damages have not been proven even in an approximate amount in your judgment, then

1 you should, as to that defendant, enter a zero ("0") in the appropriate blank on the special verdict  
2 form.

3 27.

4 When you begin your deliberations, you should elect one member of the jury as your  
5 foreperson. That person will preside over the deliberations and speak for you here in court.  
6 I recommend that you select a foreperson who will be good at leading a fair and balanced  
7 discussion of the evidence and the issues.

8 28.

9 In your deliberations it is usually a mistake to take a straw vote early on. This is due to  
10 the risk of jury members expressing a premature opinion and then, out of pride, digging their  
11 heels. Rather, it is usually better to discuss the evidence, pro and con, on the various issues  
12 before proceeding to take even a straw vote. In this way, all the viewpoints will be on the table  
13 before anyone expresses a vote. These are merely recommendations, however, and it is up to you  
14 to decide on how you wish to deliberate.

15 29.

16 Your verdict as to each claim and as to damages, if any, must be unanimous. Each of you  
17 must decide the case for yourself, but you should do so only after you have considered all of the  
18 evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

19 30.

20 Do not be afraid to change your opinion if the discussion persuades you that you should.  
21 Do not come to a decision simply because other jurors think it is right. It is important that you  
22 attempt to reach a unanimous verdict but, of course, only if each of you can do so after having  
23 made your own conscientious decision. Do not change an honest belief about the weight and  
24 effect of the evidence simply to reach a verdict.

25 31.

26 Some of you have taken notes during the trial. Whether or not you took notes, you should  
27 rely on your own memory of what was said. Notes are only to assist your memory. You should  
28 not be overly influenced by the notes.

132.

14When you retire to the jury room to deliberate, the Clerk will bring you the following:

15

161. All of the exhibits received into evidence;
172. An index of the exhibits;
183. A work copy of these jury instructions for each of you;
194. A work copy of the verdict form for each of you; and
205. An official verdict form.

21You do not have to discuss the questions in the strict sequence indicated in the special  
22verdict form, but you must, by the end, answer them unanimously as indicated in the form.23When you recess at the end of a day, please place your work materials in the brown  
24envelope provided and cover up any easels containing your work notes so that if my staff needs  
25to go into the jury room, they will not even inadvertently see any of your work in progress.

2633.

27A United States Marshal will be outside the jury-room door during your deliberations.  
28If it becomes necessary during your deliberations to communicate with me, you may send a  
29note through the marshal, signed by your foreperson or by one or more members of the jury.  
30No member of the jury should ever attempt to communicate with me except by a signed writing,  
31and I will respond to the jury concerning the case only in writing or here in open court. If you  
32send out a question, I will consult with the lawyers before answering it, which may take some  
33time. You may continue your deliberations while waiting for the answer to any question.  
34Remember that you are not to tell anyone — including me — how the jury stands, numerically  
35or otherwise, until after you have reached a unanimous verdict or have been discharged. Do not  
36disclose any vote count in any note to the Court.

3734.

38You have been required to be here each day from 7:45 a.m. to 1:00 p.m. Now that you  
39are going to begin your deliberations, however, you are free to modify this schedule within  
40reason. For example, if you wish to continue deliberating in the afternoons after a reasonable  
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**United States District Court**  
For the Northern District of California

1 lunch break, that is fine. The Court does, however, recommend that you continue to start your  
2 deliberations by 8:00 a.m.

3 It is very important that you let the Clerk know in advance what hours you will be  
4 deliberating so that the lawyers may be present in the courthouse at all times the jury is  
5 deliberating.

6 35.

7 You may only deliberate when all of you are together. This means, for instance, that in  
8 the mornings before everyone has arrived, or when someone steps out of the jury room to go to  
9 the restroom, you may not discuss the case. As well, the admonition that you are not to speak to  
10 anyone outside the jury room about this case still applies during your deliberation.

11 36.

12 After you have reached a unanimous agreement on a verdict, your foreperson will fill  
13 in, date and sign the verdict form and advise the Court through the marshal that you have  
14 reached a verdict. The foreperson should hold on to the filled-in verdict form and bring it into  
15 the courtroom when the jury returns the verdict. Thank you for your careful attention. The case  
16 is now in your hands. You may now retire to the jury room and begin your deliberations.

17  
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19  
20 Dated: April \_\_\_, 2010.

21 \_\_\_\_\_ JURY FOREPERSON  
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